

Access to remedies and the emerging ethical dilemmas: changing contours within the business-human rights debate*

Acesso a remédios e os dilemas éticos emergentes: mudando os contornos dentro do debate sobre negócios e direitos humanos

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ABSTRACT

The objective of this paper is to contest the inclusion of human rights waivers in settlement agreements and argue that such agreements create barriers to access to justice especially in cases involving corporate human rights abuse. Human rights waivers force the survivors of corporate wrongdoings to waive their right to access judicial remedies and extinguish the legal liability of corporations in exchange for monetary compensation. Settlement agreements, which use human rights waivers, are widely touted as the desired remedial norm in cases of corporate wrongdoings and has been continuously employed by corporate actors. Firstly, to tackle this contentious issue the paper will explore settlement agreements from an ethical perspective. Secondly, it will argue that such human rights waivers create compulsive situations because of which survivors are denied their human rights. The article will take three different perspectives on how these compulsive situations can be counter-theorized namely through: asserting the right to life, challenging settlements through public policy clauses and securing ethical remedies within the Guiding Principles. The conclusion of the paper is that the nature of remedies needs to be embedded in a more ethical framework to address complex business-human rights issues. The originality of the research lies in the fact that the consequences of using waivers and its effect on the access to remedies remains unexplored within legal scholarship thereby meriting this research.

Keywords: Waivers. Human Rights. Guiding Principles. Business. Corporations.

RESUMO

O objetivo deste artigo é contestar a inclusão de renúncias de direitos humanos em acordos de solução de controvérsias e argumentar que tais acordos criam barreiras ao acesso à justiça, especialmente em casos que envolvem abuso corporativo de direitos humanos. As renúncias aos direitos humanos forçam os sobreviventes de irregularidades corporativas a renunciarem ao seu direito de acesso a recursos judiciais e a extinguir a responsa-

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bilidade legal das empresas em troca de compensação monetária. Os acordos, que usam renúncias a direitos humanos, são amplamente considerados como a norma corretiva desejada em casos de irregularidades corporativas e têm sido continuamente empregados por atores corporativos. Em primeiro lugar, para lidar com essa questão contenciosa, o artigo explorará os acordos de solução de pagamento de uma perspectiva ética. Em segundo lugar, argumentará que tais renúncias aos direitos humanos criam situações compulsivas por causa das quais os sobreviventes são privados de seus direitos humanos. O artigo terá três perspectivas diferentes sobre como essas situações compulsivas podem ser contrateorizadas, a saber: afirmando o direito à vida, desafiando acordos por meio de cláusulas de política pública e assegurando remédios éticos dentro dos Princípios Orientadores. A conclusão do artigo é que a natureza dos remédios precisa ser incorporada em uma estrutura mais ética para abordar questões complexas de direitos humanos de negócios. A originalidade da pesquisa reside no fato de que as consequências do uso de renúncias e seus efeitos sobre o acesso a remédios permanecem inexploradas no âmbito acadêmico legal merecendo, portanto, esta pesquisa.

Palavras-chave: Renúncias Direitos humanos. Princípios Orientadores. Negócios. Corporações.

1. INTRODUCTION

The recently concluded 2017 Business and Human Rights Forum was centred around the theme ‘Realizing Access to Effective Remedy’. The Concept Note of the Forum clearly mentioned the need to examine ‘systematic flaws’ and ‘shortcomings’ within the current structure of access to remedies while revising ‘emerging good practices and innovations’.¹ The imminent need to focus on access to remedies reflects the historicity of neglect in the development of the Third Pillar. Part of this neglect can *arguably* be blamed on the post-cold war world which resulted in the emergence of a neo-liberal economic order with globalization promoted as the elixir for under-industrialized countries to achieve ‘prosperity’. This clearly has not worked out favourably for all the stakeholders involved in this ‘prosperity’ project. The rise of Transnational Corporations (TNCs)

throughout this period generated much debate on how corporations can be held accountable for wrongdoings. Settlement agreements appeared to be one of the most common approaches used by corporations to avoid risking brand reputation and quickly settling survivors’² claims in a post-disaster situation. In the infamous Bhopal Gas Tragedy case, the State through passing of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 arrogated to itself the ‘exclusive right to represent’ the survivors and subsequently, arrived at a settlement agreement to the tune of \$470 million.³ Whenever corporations are involved in human rights violations, such settlement agreements raise serious ethical questions regarding how we perceive access to justice and more specifically, the evolving nature of remedies while providing an insight into the shifting idea of justice. Historically, the Universal Declaration of Human Rights (UDHR) seemed inadequate to establish norms regulating corporations and any obligation to bind TNCs emanating out of UDHR would seem to be placed on the most “uncertain grounds” and such duties, at best, would be called “ethical duties”.⁴

The arrival of United Nations Guiding Principles on Business and Human Rights⁵ seem to be a pyrrhic victory as it seems to have not done enough to sponsor ideas on an ethical code for settlement agreements. This compels us to investigate further on the ethics of settlement agreements which include waiving of rights in the context of corporate wrongdoings. A broader auxiliary food for thought which will emanate out of this paper will be ‘how do we understand the social responsibility of businesses?’. Friedman discarded any conversation on social responsibilities of business for their “analytical looseness and lack of rigor”.⁶ On the other hand,

2 PAPENDICK, Michael; BOHNER, Gerd. Passive victim: strong survivor? Perceived meaning of labels applied to women who were raped. *PLoS ONE*, v. 12, n. 5, 2017. The research highlights how English-speaking participants deemed survivor as a more psychologically stable term than victim in cases of sexual assault.

3 CROSSETTE, Barbara. India Supreme Court Backs Carbide’s Bhopal Settlement. *The New York Times*, 1989.; See The Bhopal Gas Leak Disaster (Processing Of Claims) Act.

4 KINLEY, David; TADAKI, Junko. From talk to walk: the emergence of human rights responsibilities for corporations at international law. *Virginia Journal of International Law*, v. 44, n. 4, p. 931, 2004.

5 UNITED NATIONS. *Guiding principles on business and human rights: implementing the United Nations “Protect, Respect and Remedy” framework*, [s.l.]: Human Rights Council, 2011.

6 FRIEDMAN, Milton. The social responsibility of business is to increase its profits. In: ZIMMERLI, Walther Ch; HOLZINGER, Markus; RICHTER, Klaus (Org.). *Corporate ethics and corporate*

1 OHCHR | 2017 Forum on Business and Human Rights.

Chomsky questions the presuppositions of the legitimacy of corporate power and forces us to rethink the role of corporations within society.⁷ A purely economic analysis of corporate social responsibility norms suggests that it would work better in monopolistic markets and any deviation from the goal of profit maximization can lead to shrinking of firms.⁸ The nature of corporations and the debate surrounding such issues, like one on social responsibility, has also prompted strong support for governmental regulation.⁹ Therefore, the cause and reaction surrounding the emergence of the role of corporations remain hotly contested.

This paper broadly focuses on the ethical dimensions of settlement agreements. More specifically, it aims to critically investigate the ethics behind settlement agreements and re-read it as an attempt to stifle the right to access to remedies in cases of violation of human rights by TNCs. This paper will form the basis of a larger debate on the increasing role of private remedies. Part 2 of the paper will firstly try to establish the role of human rights waivers in legal theory which forms the essential part of settlement agreements. Two of the major theories on function of rights i.e., Will Theory and Interest Theory will be explored ostensibly to set the philosophical foundations of the debate. The tensions and contradictions of theorizing the philosophical debates within the contemporary situation involving corporations as stakeholders will be traversed. An example of the rights of Qatari construction workers and how the law promotes waiver of fundamental rights like right to sue will highlight the tensions within the ethical and positivist perspectives regarding operations of human rights. Part 3 will make a case against settlements involving waiver of human rights from three different

perspectives namely, right to life, public policy clauses and the role of the Guiding Principles. These three perspectives will be wearing the lens of ethical and normative standards and contribute to the wider argument of ethical objections to settlement agreements as a mode of creating compulsions and limitations to the rights of the survivors.

2. LOCATING HUMAN RIGHTS WAIVERS IN LEGAL THEORY

A need to locate human rights waivers within legal theory remains necessary to lay the groundwork within legal theory. This can be achieved through exploring the functionality of rights and how they interact in the context of human rights waivers. To understand the issue further a brief introduction of the theories regarding functionality of rights will be explained along with its critique. The tensions try to further expand on the issue of survivor autonomy considering the universality and inalienability of the nature of human rights. These debates, by no means exhaustive, will be further contextualized through examples of migrant workers in Qatar and how their rights under international law remain suppressed because of the use of waivers endorsed by the Qatari Constitution. To achieve more effective remedies, it is important that the remedies remain ethical in the first place by not allowing human rights waivers.

2.1. Will and Interest Theory

Not much has been written about human right waivers in general but there has always been contentious scholarly debate surrounding the nature and function of rights. This section will endeavour to understand settlement agreements through the prism of functional approach towards rights and briefly contextualize it in the realm of corporate wrongdoings. To reflect further on this, we first need to revisit the two major theories on the function of rights: Will theory and Interest theory. Will theorist assert that you have a right to X if and only if you can claim the right to X against others and have the power to waive or enforce others' duties regarding X. For example, if X owns a laptop, X becomes a "small-scale sovereign"¹⁰ over the relevant duties of

governance. Berlin; Heidelberg: Springer Berlin Heidelberg, 2007. p. 173-178.

7 CHOMSKY, Noam. *U. S. Defense and Corporate Social Responsibility?* Noam Chomsky interviewed by an anonymous interviewer. Disponível em: <<https://chomsky.info/19810408/>>. Acesso em: 2 maio 2018.

8 POSNER, R. A. *Economic analysis of law*. 9. ed. New York: Wolters Kluwer Law & Business, 2014. p. 582.

9 STEPHENS, Beth. The amorality of profit: transnational corporations and human rights Stefan A. Riesenfeld Symposium 2001. *Berkeley Journal of International Law*, v. 20, n. 1, p. 45, 2002, p. 82. Stephens traces the origins of corporations and provides a detailed analysis of the rise of corporations starting from the fifteenth century and explores the nature of profit maximization of most corporations. While advocating for state regulation of corporations she finds that there is an "unwillingness to accept social obligations as part of the business ethics".

10 HART, H. L. A. *Legal rights: essays on Bentham*. Oxford: Ox-

others as X can either allow others to touch her laptop or not, at her own discretion. Interest theorists disagree with this position. They argue that the function of a right is to further the right-holder's interest. In plain terms, X has a right to something means that it is in X's interest or benefit to have that right which is a sufficient reason, other things being equal, for holding someone else to be under duty.¹¹ For example, Raz points out that a journalist's interest in maintaining confidentiality of their sources is valued because of its usefulness to the public at large.¹² These two theories are not exhaustive in itself but there are many variations. I am only providing a brief overview of the two theories as preliminary delineations to the reader to formulate a philosophical basis for further discussion.

2.1.1. Critiquing the theories: in brief

Since we have now established the two theories, we can move further with critiquing the theories and see how human rights waivers in settlement agreements fall within a grey area of these theories. The major criticism of the Will theory has been the implications of the theory on 'marginal cases'¹³; human beings who are momentarily or eternally indisposed of taking rational decisions in an independent manner. This includes schizophrenics, mentally challenged people or individuals in permanent comatose condition. MacCormick also argued that the will theory does not accommodate children's rights because children "lack the normative power to enforce or waive their rights"¹⁴ and proposes a "modified form of interest theory"¹⁵ while rejecting will theory. Similarly, the interest theory is quite rooted in pure human self-interests which seems to be in

contradiction to universal moral claims. For example, if freedom is understood as a basic universal moral claim then freedom cannot be constitutive to human interests as it would be contradiction.

The greater problem emerges when we try to locate human rights within these two theories. These two theories are normative human rights theories which have tried to define the philosophical underpinnings of the doctrine of human rights. I will now highlight the tension between human rights waiver clauses in settlement agreement and test it with these two theories.

2.2. Tensions

The survivors of human rights violations are generally not able to exercise their right to remedies and are curtailed from availing other remedies through settlement of cases which forms the core of the tension. The Preamble to the Universal Declaration of Human Rights declares Human Rights to be "equal and inalienable rights of all members of the human family".¹⁶ The Vienna Declaration and Programme of Action, explicitly stated that "the universal nature of these rights and freedoms is beyond question".¹⁷ Inalienable is defined as "Not able to be taken away or given up without consent of the possessor"¹⁸ and more generally as "Not assignable or transferable".¹⁹ Human rights are inalienable because you do not possess the power to waive others' duties with respect to your primary human rights. For example, the inalienable right to be free from slavery means that you cannot sell yourself into slavery or lack the power to waive the duty on someone else to not enslave you. Will theory cannot accommodate the inalienable character of human rights because under this theory unwaivable rights do not exist. There cannot be any right over which the right-holder has no control. Therefore, if a survivor's human rights were violated by corporations then she cannot, under will theory, waive her human rights, even in exchange of any monetary compensation. Any waiver will deny autonomy to the survivor regarding her authority over her rights. This theory reveals the connection between "rights and nor-

ford University Press, 1982. p. 183.

11 RAZ, Joseph. *The morality of freedom*. Oxford: Oxford University Press, 1988. Raz argues that "'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty."

12 RAZ, Joseph. *The morality of freedom*. Oxford: Oxford University Press, 1988. p. 179.

13 IEP. *Human rights*. Internet Encyclopedia of Philosophy. Disponível em: <<https://www.iep.utm.edu/hum-rt/#SH4c>>. Acesso em: 27 abr. 2018.

14 MACCORMICK, Neil. Children's rights: a test-case for theories of right. *ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy*, v. 62, n. 3, p. 305-317, 1976.

15 MACCORMICK, Neil. Children's rights: a test-case for theories of right. *ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy*, v. 62, n. 3, p. 305-317, 1976.

16 Universal Declaration of Human Rights.

17 Vienna Declaration and Programme of Action.

18 BLACKWELL, Amy Hackney. *The essential law dictionary*. Naperville, Ill: Sourcebooks, 2008. v. 1.

19 GARNER, Bryan A.; BLACK, Henry Campbell. *Black's law dictionary*. [s.l.: s.n.], 2014.

mative control.”²⁰ In case of corporate wrongdoings, the autonomy of the survivor is central to achieving justice because access to remedy posits that survivor cannot be extricated from her right to pursue all the available remedies without being pressurised into accepting a settlement agreement. The ethical framework is directly linked to the inalienability of human rights of the survivor of corporate wrongdoings.

For this difficulty, human rights are rooted and granted to be understood in the Interest model. Interest model would tackle the question of inalienability through asserting that human rights protect “sufficient interests” hence they remain inalienable. For example, if a slave labourer can get a higher standard of well-being by waiving away her right not to be enslaved and surrenders herself to the local lord then interest theory would allow one to waive her human right because it is in the labourer’s interest.²¹ The goal of promoting one’s well-being is achieved through violation of human rights. Going by the interest theory or more specifically, the instrumentalist model of justification, the survivor of corporate wrongdoings would be better off accepting settlement agreements as it would advance some of the weighty interests. This also foments tensions with the “universality” of human rights. If human rights are considered as universal, then they cannot be violated at any cost and are available to all human being without any prejudice on the grounds of sex, creed, religion, colour, sexuality etc. Going back to the previous example of a slave labourer, if an individual waives away her right not to be enslaved then it only leads to the denial of the normative character of the “universality” of human rights.²² It is also not possible to consider human rights as mere positive rights or deny human rights to be inalienable or universal. Both these do not seem very possible explanations for understanding the functional approaches towards human rights. The survivor of a corporate wrongdoing as a right-holder remains float-

ing in an undefined territory within the sea of theoretical framework of functionality of rights. Zylberman argues that Kant’s juridical idea of human rights having *a priori right* status offers adequate solution to the current dilemma. He argues that “human rights function as constitutive conditions of any claim of rights”.²³ I shall not expand on the possible theoretical solutions, but this part establishes the existing theoretical dilemmas towards understanding the functionality of rights and how they challenge existing understanding of inalienability and universality. The following section will further apply the theoretical challenges in real life problems regarding business and human rights.

2.3. Contextualising the theories: curious case of qatari workers vis-à-vis commercial contracts

The human rights abuse of the construction workers in Qatar has been a major issue, especially in wake of Qatar’s bid to host the FIFA World Cup 2022.²⁴ Rights violation of migrant workers, who constitute an overwhelming majority in the construction sector, by Qatari construction companies is no hidden issue. Settlement agreements remain the widely practised method of resolving disputes with aggrieved parties.²⁵ The Permanent Constitution of Qatar, which was ratified in 2004, has incorporated the right of litigation as “inviolable” under Article 135.²⁶ Article 403 of the Civil Code²⁷ mentions that any claim for personal rights is statutorily time barred to 15 years. Further, Article 418 of the Code prohibit variation in the statutory prescription periods.²⁸ Many settlement agreements include

23 ZYLBERMAN, Ariel. Kant’s juridical idea of human rights. In: MALIKS, Reidar; FØLLESDAL, Andreas (Org.). *Kantian theory and human rights*. New York: Routledge, 2013. p. 28, 36 et. seq.

24 BOOTH, Robert. Qatar World Cup construction “will leave 4,000 migrant workers dead”. *The Guardian*, 2013.

25 MCDONALD, Pamela. *How enforceable are settlement agreement waivers?*. ConstructionWeekOnline.com. Disponível em: <<http://www.constructionweekonline.com/article-43316-how-enforceable-are-settlement-agreement-waivers/>>. Acesso em: 30 abr. 2018.

26 The Permanent Constitution of the State of Qatar, 2004. Article 135 states that “The right of litigation is inviolable, and it shall be guaranteed to all people. The law shall specify the procedures and manner of exercising this right.”

27 Regarding Promulgating the Civil Code. The Article states that, “The claim of any personal right shall prescribe after the lapse of a period of fifteen years, except where another period is provided for either by law or by the events described in the following Articles.”

28 Regarding Promulgating the Civil Code. Article 418 of the Civil Code, which states that “Prescription may not be waived before the right thereto is established. The period for prescription shall

20 WENAR, Leif. Rights. In: ZALTA, Edward N. (Org.). *The Stanford encyclopedia of philosophy*. Stanford: Metaphysics Research Lab, Stanford University, 2015.

21 ZYLBERMAN, Ariel. Kant’s juridical idea of human rights. In: MALIKS, Reidar; FØLLESDAL, Andreas (Org.). *Kantian theory and human rights*. New York: Routledge, 2013. p. 31.

22 The normative characteristic of human rights as “Universal” has been contested and the changing positions of global political power and increasing sense of cultural relativism of established norms within the realpolitik reminds us of the same. See, DONNELLY, Jack. The relative universality of human rights. *Human Rights Quarterly*, v. 29, n. 2, p. 281-306, 2007.

waiver of right to future litigation and are being used by companies to settle disputes. The Constitution and Article 418 of the Qatari Civil Code ensure the right to litigation, yet many infrastructure projects are settled through agreements with waiver clauses under Article 573 which is titled 'Reconciliation'.²⁹ The finality and effects of the reconciliation is also reflected in Article 577(2).³⁰ Therefore, agreements in which parties waive their rights to future litigation are enforceable in Qatar and perfectly within the bounds of law.

Extrapolating from the abovementioned example, if a construction worker before starting employment waives away her right to pursue future claims-litigation as a condition towards securing employment then it remains speculative as to how can human right be secured. If the law permits settlement of all claims, then how do we understand the limits of law vis-à-vis human rights. The positive law contradicts ethical as well as international obligations directly in this case. This case showcases the constant infighting between the different understandings of law and indicates the changing nature of access to justice. The Qatari Law is one of the many examples which reflect the broader ethical questions needed to be considered while contextualizing business and human rights debates. An ethical perspective on access to remedy can aid us in understanding reconciliation between the 'ought' and 'is' proposition in cases involving corporations using settlement agreements. The absence of an ethical framework in settlement agreements especially in cases of human rights waivers requires us to further investigate the ethical theories of human rights and observe the creation, re-creation and multiplication of compulsions which curtail access to remedies.

3. HUMAN RIGHTS WAIVERS AND CREATING COMPULSIONS

To explore the ethical issues regarding usage of human rights waivers in settlement agreements by corpo-

rations this section will make a case against the attempt of limitation of survivor's rights in guise of settlement agreements through three different theoretical positions. These three different positions are (1) Right to Life, (2) Public Policy Clauses and, (3) Guiding Principles on Business and Human Rights. These three perspectives will provide a more coherent understanding of the individual, the contractual and the international dimensions involved in promoting a wider ethical framework in remedial structures. There could be many other positions like of the survivor community, the civil society etc. but to maintain a coherent argument I restrict myself to these positions which remain vital towards ensuring access to remedies. The usage of the word 'compulsion' is a deliberate effort to highlight the wider panoply of conditions in which human rights operate. In some cases, such as Trafigura's toxic waste dumping in Côte d'Ivoire the State's active involvement in dropping of all charges existing as well as those arising in future in exchange of settlement amount results in dissuading survivors from availing other remedies, especially judicial remedies. The creation of compulsions and unfavourable conditions might result in survivors giving up their right to remedies and willingly inhibit their own human rights. This dichotomy where the autonomous survivor remains free yet bound while seeking remedies reflect the need to align an ethical framework to these settlement agreements. The rise in settlement agreements also highlights the limits of 'development' as we understand it in the era of globalization. TNCs being the major players in the economy have altered the nature of remedies which is offered but are also posing major ethical challenges to the wider definition of justice. These challenges will be elaborated further in the following sections.

3.1. Right to life

The right to life is secured for all individuals and any infringement of the same is usually prohibited by various international laws as well as domestic laws. In Locke's famous work titled 'Second Treatise of Civil Government'³¹ he wrote that "being all equal and independent, no one ought to harm another in her life, health, liberty, or possession." This classical liberal thought provided *inter alia* a solid moral foundation for the right

be established by law only."

29 Regarding Promulgating the Civil Code. The Article states that, "Reconciliation is a contract under which the parties settle a dispute between them, or avoid a contingent dispute by each party waiving the corresponding part of their claim."

30 Regarding Promulgating the Civil Code. The Article states that, "As a result of reconciliation, rights and claims finally waived by the parties shall lapse."

31 LOCKE, John. The second treatise of civil government and a letter concerning toleration. Oxford : B. Blackwell, 1948. Chapter 2 Section VI.

to life. But it has always faced challenges from ruling establishments throughout the centuries rendering the basis of human rights as uncertain. Scholars like Griffin argue that even Locke does not provide with the foundation of human rights and he asserts that the whole moral space would be filled by rights if rights were to be generated through moral viewpoints alone.³² Despite the contrary opinions, right to life remains an overarching moral principle which ensures that no one is whimsically deprived of their life and it *prima facie* seems to be one of the foundation stones of human right theories. It is mentioned in several international instruments like International Covenant on Civil and Political Rights (Article 6), Charter on Human and Peoples' Rights (Article 4), African Charter on the Rights and Welfare of the Child (Article 5), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Article 4), Arab Charter on Human Rights (Article 5, 6), European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 2), American Declaration of the Rights and Duties of Man (Article 1), American Convention on Human Rights (Article 4), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belém do Pará" (Article 4).³³ The preponderance of international instruments incorporating provisions respecting right to life reflects its conceptual relevance and importance. The argument made here is that right to life is directly linked to right to seek remedies (even when some forms of non-financial compensation for denial of the right to seek remedies can be asserted through other means).³⁴ A connection between these two rights is essential to develop a framework of moral-legal ethical position against deprivation of human rights. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law³⁵ provides for the right to equal access

to remedies. It categorically establishes the right of victims to seek remedies including private remedies even though the primary responsibility lies with the State. The gamut of remedies is not only limited to official remedies but are extended to private remedies as well. This indicates that any ethical framework will and must incorporate private remedies.

In the seminal caselaw of *Marbury v. Madison*³⁶ the Court held that "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." The enjoyment of life is directly linked to access to remedies and any right to seek remedies in cases of infringement of our enjoyment is impermissible even through employing arbitration claims.³⁷ Even within the constitutional sphere, the idea of surrender or waiver of constitutional rights which involves right to life has been disputed from the early twentieth century. In *Insurance Company v. Morse*³⁸ the Court while discussing the contractual surrender of constitutional rights as invalid and repugnant to the constitution of the United States and laws in pursuance thereof the Court held that, "any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit her rights at all times and on all occasions, whenever the case may be presented." Similarly, in *Fox River Paper Co. v. Railroad Commis-*

36 *Marbury v. Madison*.

37 HYLTON, Keith N. Agreements to waive or to arbitrate legal claims: an economic analysis. *Supreme Court Economic Review*, v. 8, p. 209-263, 2000. Hylton offers an economic analysis of the role of arbitration claims to Title VII suits. He locates the history of arbitration claims regarding employment claims and writes "The most important statement on the scope of arbitration in the employment setting is the Supreme Court's decision in *Alexander v. Gardner-Denver Co.* which held that a union cannot waive an employee's right to litigate under Title VII of the 1964 Civil Rights Act. The opposing precedent, decided much later, is *Gilmer v. Interstate/Johnson Lane Corporation*, which enforced an arbitration agreement covering an age discrimination claim signed by an employee in the securities industry. Since *Gilmer*, lower court decisions have largely remained consistent with this distinction, enforcing arbitration agreements covering statutory rights in the individual-versus-employer context and refusing to enforce in the union context. The two exceptions are the Ninth Circuit in *Duffield v. Robertson Stephens & Co.*, and the Fourth Circuit in *Austin v. Owens-Brockway Glass Container Inc.* *Duffield* held that the 1991 Civil Rights Act precludes mandatory arbitration with respect to Title VII claims. *Austin* seems to reject *Alexander* altogether, holding that unions can consign statutory employment claims to the arbitration process."

38 *Insurance Company v. Morse*.

32 GRIFFIN, James. On human rights. Oxford: Oxford University Press, 2008. p. 214.

33 OHCHR. *International standards*. Disponível em: <<http://www.ohchr.org/EN/Issues/Executions/Pages/InternationalStandards.aspx>>. Acesso em: 1 maio 2018.

34 PALFIN, R. A.; DANNINGER, B. B. *Hedonic damages: proving damages for lost enjoyment of living*. [s.l.]: Michie, 1990.

35 UN GENERAL ASSEMBLY. *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of International Human Rights Law and serious violations of International Humanitarian Law*.

sion of Wisconsin,³⁹ the Court held that a requirement which waives away the party's right to receive compensation, should the dam in question be appropriated after thirty years as valid in eyes of law.

More recently, in *United States v. Oliver*⁴⁰ the Court mentioned the "presumption against the waiver of constitutional rights" (relying on the *Harcrow*⁴¹ case) and added that the waiver of rights is possible provided it is "clearly established that there was 'an intentional relinquishment or abandonment of a known right.'"⁴² In *Gonzalez v. United States*,⁴³ Scalia J. while concurring clarified that, "certain 'fundamental' or 'basic' rights cannot be waived unless a defendant personally participates in the waiver." The Indian Supreme Court has been more cautious regarding allowing of waiver of fundamental rights. In the leading judgment of *Basheshar Nath v. The Commissioner of Income-Tax, Delhi & Rajasthan & Another*,⁴⁴ it was only Das J. (minority opinion), who observed that fundamental rights can be waived provided they are given for the individual and not for those rights which are available to the public. In the European legal realm, Schutter reminds us to be cautious of attaching too much weight to the idea that rights recognized within the European Convention on Human Rights may be hierarchized and that some rights being "more fundamental, or instituted, rather than for the sole benefit of the individual, for the benefit of the whole of society, and thus not waivable by the right-holder."⁴⁵ The varied limitations on waiver of fundamental rights also reproduce the nature of constitutional morality which prohibits allowing waivers of rights explicitly. Right to life being an inseparable part of the wider ambit of guaranteed human rights reflects the moral framework embedded in many constitutional texts. Therefore, an argument can be made that rights such as right to not have fundamental rights waived and right to seek remedies are important limbs of the right to life which opposes the conditions of compulsions and denial of entitled remedies. However, one of the

other factors which might affect the operation of human rights in settlement agreements and help us frame the ethical dilemma in context is the consent of the survivors of corporate human rights violations. Consent of survivors to agree to settlement is an important part of the ethics of settlement agreements will be investigated in the following section in brief.

3.1.1. Consent

The requirement of consent of the survivor to agree to the terms of settlement is extremely crucial in understanding the ethical underpinnings of modern day settlement agreements and helps us navigate the unequal power dynamics between the two players involved. An uninformed consent towards settlement of agreement by survivors leads to an unconscious violation of rights. This was quite visible in the *Barrick* case where "business grants" were provided in exchange for waiving legal rights.⁴⁶ The European Court of Human Rights [ECtHR] has laid down that waiver must be free, unambiguous and "established in an unequivocal manner",⁴⁷ and this was extended even in the case of waiver of procedural rights.⁴⁸ Van Drooghenbroeck while equating waiver and consent argues that it impacts the existence of rights and the current conflicts between two rights.⁴⁹ In *Sörensen and Rasmussen v. Denmark*,⁵⁰ it was held that compelling a person to join a specific trade union as part of his condition of employment is in breach of the European Convention of Human Rights. The compulsion to join employment due to economic constraints may impact the 'free' nature of consent/waiver. In *Albert and Le Compte v. Belgium*,⁵¹ the Court gave some indications on the inclusion and exercise of waiver of 'certain' rights as guaranteed wi-

39 Fox River Paper Co. v. Railroad Commission of Wisconsin.

40 United States v. Oliver.

41 United States v. Harcrow.

42 Brookhart v. Janis.

43 Gonzalez v. United States.

44 Basheshar Nath v The Commissioner of Income-Tax, Delhi & Rajasthan & Another, Indian Supreme Court 1959 AIR 149.

45 SCHUTTER, Olivier de. Waiver of rights and state paternalism under the European Convention on Human Rights. *Northern Ireland Legal Quarterly*, v. 51, n. 3, p. 481-508, 2000. See, n17.

46 Survivors of Rape by Barrick Gold Security Guards Offered "Business Grants" and "Training" in Exchange for Waiving Legal Rights.

47 Oberschlick v Austria (No 1). Court held that, "According to the Court's case-law, waiver of a right guaranteed by the Convention — in so far as it is permissible — must be established in an unequivocal manner (see, inter alia, the Barberà, Messegué and Jabardo judgment of 6 December 1988, Series A no. 176, p. 35, para. 82)."

48 Pfeifer and Plankl v Austria.

49 VAN DROOGHENBROECK, Sébastien. Conflict and consent: does the theory of waiver of fundamental rights offer solutions to settle their conflicts? In: SMET, Stijn; BREMS, Eva (Eds.). *When human rights clash at the European Court of Human Rights: conflict or harmony?* Oxford: Oxford University Press, 2017.

50 Sörensen and Rasmussen v. Denmark.

51 Albert and Le Compte v Belgium.

thin the Convention:

Admittedly, the nature of some of the rights safeguarded by the Convention is such as to exclude a waiver of the entitlement to exercise them [...] but the same cannot be said of certain other rights. Thus, neither the letter nor the spirit of Article 6 para. 1 (art. 6-1) would prevent a medical practitioner from waiving, of her own free will and in an unequivocal manner [...] the entitlement to have her case heard in public; conducting disciplinary proceedings of this kind in private does not contravene Article 6 para. [citations omitted].

Similarly, there are other caselaw on the role of free consent involving employment contracts within ECtHR⁵² which provide guidance on the polemical topic of consent. The impetus on securing the free will of the individual by the Court reflects that merely providing consent should not be a parameter for waiver of rights. This problem of redefining consent would be exacerbated with the involvement of corporations as they tend to be the more influential party in settlement agreements therefore blurring the lines between consent and informed consent. The dilemma is whether an individual will be better off by bargaining her rights in exchange of a benefit even if the consent for the trade-off was reached through an uninformed consent or on the other hand, is the requirement of a higher standard of consent merely paternalism by the State as it tries to enforce upon the right-holder a higher moral-legal standard? It is not necessary to view this dilemma only through the prism of the presented binaries and the whole issue remains indecisive. Some teleological ethicists would even call such a debate unnecessary. An alternative way to look at such issues is through understanding that rights are also marketable commodities and they do not require any further consent from any other entity beyond the right holder.⁵³ But that discussion shall be laid to rest here.

3.2. Public policy clauses

One of the foremost contributors in economics Prof. Amartya Sen, has argued that “human rights are best seen as articulations of social ethics, comparable to-but very different from utilitarian ethics.”⁵⁴ He argues

that if human rights can survive “open and informed scrutiny” then this scrutiny is what validates the general claim for human rights. Prof. Sen adds that the idea of human rights is essentially ethical and should not be confined to only narrow legal boxes and terminologies. However, human rights have been restricted within the textual boundaries of legislations and rules. One of the areas where human rights indirectly interacts beyond the text is within the traditional contract law principle of public policy. This section will argue that public policy acts not only as a legal but also as an ethical barrier to unjust settlement agreements by *arguably* rendering them unenforceable in the eyes of law. Public policy has often been called as “an unruly horse”.⁵⁵ Nevertheless, public policy clauses under contract law can form a significant ethical core of settlement agreements as they can act as potential objection towards settling of disputes through unfair agreements. In terms of understanding the contract-based conception of human rights in private relationships, it is pertinent to note that ethical barriers within contract law have remained underexplored and therefore it warrants further research. This section will further amplify the ethical objections against settlements in cases of human rights violations by corporations. To clarify, it must be said that the aim is not to dismiss the proposition of awarding financial compensation received by the survivors of human rights violations but to make a case against settling of legal liabilities in lieu of financial compensation offered to survivors in a post-disaster situation.

The enormous litigation cost has led to a massive push within the corporate sector for seeking alternative remedies for settling legal cases. Even law schools have started courses on these subjects. This push for seeking alternative remedies has not left the human rights arena untouched. The settlement agreements arrived at between the corporations and survivors can be questioned on ethical as well as contract law jurisprudence. Within the domain of contract law, settlement agreements can *arguably* be against public policy which might render such agreements illegal.⁵⁶ Coleman and Silver argue that

Cardozo Law Review, v. 27, n. 6, p. 2913, 2006.

⁵⁵ Richardson v Mellish.

⁵⁶ COLEMAN, Jules; SILVER, Charles. Justice in settlements. *Social Philosophy and Policy*, v. 4, n. 1, p. 102-144, 1986.; FEINBERG, Joel. Legal paternalism. *Canadian Journal of Philosophy*, v. 1, n. 1, p. 105-124, 1971. Feinberg also elaborates on the two different types of paternalisms which exist within the legal sphere, namely weak and strong legal paternalism.

⁵² Fernández Martínez v Spain, [2014] ECtHR App. no. 56030/07 (12 June 2014).; Eweida and Others v. United Kingdom.

⁵³ RADIN, Margaret Jane. Market-inalienability. *Harvard Law Review*, v. 100, n. 8, p. 1849-1937, 1987.

⁵⁴ SEN, Amartya. Human rights and the limits of law lecture.

there is a transference of right to sue to the class of plaintiffs in cases of human rights violations and this cannot be termed as forfeiture of the right to sue.⁵⁷ On the other hand, Kirby J. et. al opinion in Fitzgerald case⁵⁸ provides us caution before curtailing freedom to contract:

Although the public policy in discouraging unlawful acts and refusing them judicial approval is important, it is not the only relevant policy consideration. There is also the consideration of preventing injustice and the enrichment of one party at the expense of the other.

The freedom to contract should, ideally, not be curtailed.⁵⁹ The dividing line between being against public policy and arbitrary curtailment of freedom to contract remains unclear. But it can be argued that any loss of access to remedies in exchange of gaining financial compensation is not a fruitful bargain as it might be an outcome of a paternalistic deal influenced by many other factors such as power dynamics between the corporation and the survivors etc. Intrinsic to such an agreement is the monetization of loss of human rights which is problematic. How do we arrive at the price of settlement agreement? How do we quantify the loss of rights? How much does each survivor of corporate human rights violation get and what is the basis for providing the amount? These difficult questions make the foundations of settlement agreement unethical and vague. Settlement agreements which are based on restriction of personal liberties⁶⁰ are against public policies and hence considered to be illegal. These agreements infringe upon the recognized public policies and the judicial enforcement of such agreements are injurious to the public at large as they tend to give a message that corporate wrongdoings can be reversed through financial means. When one can raise the public policy, clause depends on the jurisdiction, but this paper presumes

that most jurisdictions would have public policy clauses or similar clauses. In *Cf Vita Food Products Inc v. Unus Shipping Co Ltd (in liq)*⁶¹ the Privy Council held that “Public policy is not, as such, raised, unless it be the general public policy that the courts should uphold the law of the land.” Similarly, in *Materials Fabrication Pty Ltd v Baulderstone Pty Ltd*,⁶² the Court held that a clause which prevented the subcontractor from commencing and maintaining legal proceedings until depositing 10% of the amount claimed by the subcontractor in the proceedings was void. Any attempt to exclude the jurisdiction of the Court through imposing significant monetary barriers was held void as being against public policy. It has been well established that “claims for redress for breach of contract or for a remedy for tortious damage can be settled out of court.”⁶³ Not all settlement agreements are invalid, but many settlement agreements based on uninformed consent and which restrict liberties can be classified as against public policy.

The society at large does not benefit from the settlement of such cases (absence of precedent creation) and the loss of rights shakes the conscience of the society through providing impunity to corporations involved in corporate wrongdoings. The expansive interpretation of the public policy objection can render such agreements illegal. Securing justice for the survivors cannot come at the altar of sacrifice of core fundamental rights and any restriction imposed through settlements can potentially brand such contracts as unethical, if not illegal.

3.3. United Nations Guiding Principles on Business and Human Rights

The Guiding Principles elaborates upon the role of different kinds of remedies which can be offered to the survivors of human rights violations by corporations. This includes operational level grievance mechanisms which are also more generally called as ‘company level grievance mechanisms’. However, the principles do not offer much guidance on the issues surrounding ethical framework of settlement agreements. It is probable

57 CCOLEMAN, Jules; SILVER, Charles. Justice in settlements. *Social Philosophy and Policy*, v. 4, n. 1, p. 102-144, 1986. p. 131.

58 Fitzgerald v. FJ Leonhardt Pty Ltd. This case provides an insight into the operations of public policy within contract law jurisprudence.

59 Printing and Numerical Registering Co v Sampson, Court of Appeal, Eq 462 1875. Sir George Jessel MR stated in this case that “if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice.”

60 See, CHEN-WISHART, Mindy. *Contract law*. Oxford: Oxford University Press, 2012. For further reading on what kind of contracts are against public policy.

61 Cf Vita Food Products Inc v Unus Shipping Co Ltd (in liq).

62 Materials Fabrication Pty Ltd v Baulderstone Pty Ltd.

63 Felton v. Mulligan. Windeyer J. elaborates that “Claims for redress for breach of contract or for a remedy for tortious damage can be settled out of court; and actions and suits of many kinds can be compromised by agreement, after they have been commenced, provided that each of the parties is sui juris.”

that the non-binding and specific point-based elaboration of the principles did not allow further explanation on ethical dimensions of the various kinds of remedies. This section will try to argue that the Guiding Principles by not insisting on ethical remedies has left the door open for further debate on what we mean by remedies.

Providing ethical remedies is equally important as providing remedies. Unethical efforts by corporations to silence survivors' claims through using opaque company mechanisms hinders rule of law and reinforces corporate impunity. The Interpretive Guide on Corporate Responsibility to Respect Human Rights mentions that operational level grievance mechanisms are "distinct from whistle-blower systems" and of "concern to enterprise as a whole."⁶⁴ It seems that such an endeavour is an attempt of moral righteousness and pursued in order to attach an ethical outline to the principles, but it is nevertheless important, at least in terms of access to remedy. Much debate revolves around access to remedy, but the larger question remains what kind of remedy are we willing to offer to survivors? Even if corporations provide private remedies, can they be held to be unaccountable to the extent of restricting freedom of the survivors? Bilchitz argues that corporations should not be excluded from positive obligations because both Kantian and Utilitarian ethical theories recognize that "individuals have some positive moral obligations on some fundamental ethical concerns" and if this is true then there is no reason to exclude corporations from the ambit of obligations as corporations are also, ultimately, a "conglomeration of individuals."⁶⁵ If this premise is correct then it must be assumed that the kind of remedies provided both post and pre-violation need to be ethical not only because of international obligations but because it is morally justified to do so in light of the wrong committed. The text of the principles even though not using ethical arguments has always insisted on the best available remedies and the subsequent reports by the United Nations insisted on providing the

survivors with "*bouquet of remedies*".⁶⁶ Moving towards a binding treaty, this aberration could be remedied by ensuring that access includes adequate and ethical remedies being provided to survivors of human rights violations by corporations.

4. CONCLUSION

This paper argues settlement agreements, being private forms of remedies, need to be ethical. Locating waivers and the ethics of such agreements in legal theory, it tries to reveal the contradictions surrounding personal autonomy of survivors while also highlighting the many tensions posed by settlement agreements towards vulnerable populations like migrant workers. The paper forms a basis for redefining how private remedies can potentially do much damage if ethics of the same are not considered as a major part of the issue. Relying on different perspectives the paper tries to make the case for reading remedies as 'ethical remedies'. Attempt is made to recognize the basis for establishing the role of private remedies in understanding not only access to remedies but also the larger idea of justice. Our pretensions maybe misplaced when we see private remedies as replacing judicial remedies. What is more threatening is unethical remedies being considered as the future of rights-litigation in cases of corporate violation of human rights.

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64 UNITED NATIONS. The corporate responsibility to respect human rights: an interpretive guide, [s.l.]: United Nations, 2012, p. 69. It clearly mentions that "These mechanisms are distinct from whistle-blower systems, which enable employees to raise concerns about breaches of company codes and ethics, which may or may not harm those individuals, but are of concern to the enterprise as a whole."

65 DEVA, Surya; BILCHITZ, David (Org.). *Building a treaty on business and human rights: context and contours*. Cambridge: Cambridge University Press, 2017. p. 202.

66 Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, [s.l.]: United Nations General Assembly, 2017.

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